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NAFTA Chapter 19 or the WTO's Dispute Settlement Body: A Hobson's Choice for Canada

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PERSPECTIVE

NAFTA CHAPTER 19 OR THE WTO'S DISPUTE SETTLEMENT BODY: A HOBSON'S CHOICE FOR CANADA?

*Michael S. Valihora**

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I. INTRODUCTION

RECENTLY THERE HAVE BEEN SIGNIFICANT discussions regarding dispute resolution mechanisms. Much of the discussion has been spurred by the advent of the World Trade Organization's Understanding on Rules and Procedures Governing the Settlement of Disputes (Understanding).¹ Discussion originally abounded regarding the dispute resolution mechanism established by the Understanding and how it appeared to differ from GATT (1947) procedures.² Discussion has now turned to the actual application of the Understanding as cases are being heard in Geneva. In North America, dispute resolution has been a prominent issue since the Canada-United States Free Trade Agreement. The controversy surrounding the Free Trade Agreement dispute resolution mechanisms has around Chapter 19. Chapter 19 allows for the establishment of binational panels to review administrative decisions in anti-dumping and countervailing duty cases. The panels replace judicial review of agency determinations.

The Chapter 19 dispute resolution mechanism has been closely watched because of its innovative approach and its important place in the settlement of U.S. and Canadian trade disputes. Although the mechanism has been criticized, it has also been hailed by many as a unique and positive step in the area of trade disputes. The mechanism has generally been evaluated in isolation. It is unique among bilateral trade agreements and is superior to the consensus approach of GATT (1947). However, now that the GATT dispute resolution mechanism has taken such a dramatic step forward with the WTO dispute resolution mechanism, it is time to re-evaluate what was the Free Trade Agreement, and what is now the NAFTA dispute resolution mechanism.

This Article compares and contrasts the Chapter 19 process with the WTO dispute resolution mechanism to determine which mechanism Canada and its industries should rely upon in particular circumstances. Admittedly, the mechanisms differ in fundamental ways, and because of this the analysis will not lead to a decision about which is the "better" of

¹ Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, April 15, 1994, 1 Legal Instruments—Results of the Uruguay Round (1994), 33 I.L.M. 1125, 1140 (1994) (including the World Trade Organization's Understanding on Rules and Procedures Governing the Settlement of Disputes) [hereinafter Understanding].

² General Agreement on Tariffs and Trade, Oct. 30, 1947, T.I.A.S. 1700, 55 U.N.T.S. 188 [hereinafter GATT (1947)]. The pre-Uruguay Round GATT Dispute Resolution Mechanism evolved significantly between 1947 and the end of the Round.

the two. The analysis does not give preference to one particular mechanism. Instead, it is more concerned with how the two systems can coexist. Although each mechanism has a different focus, they overlap in some key respects. Therefore, anti-dumping and countervailing duty disputes must be approached in the context of both mechanisms. While the mechanisms are not alternatives to each another, they can be compared to evaluate their relative effectiveness.

Perhaps the key distinction between the two mechanisms is that Chapter 19 focuses on administrative decisions while the WTO mechanism examines national implementing legislation to determine if its decisions are in accord with WTO obligations. Generally speaking, the former looks at procedure while the latter is concerned with substance. Another key difference is that while only governments can initiate the WTO mechanism, Chapter 19 enables private industry to challenge government action.

This Article first analyzes Chapter 19. It then shifts focus to the WTO dispute resolution mechanism. The Article concludes with an analysis of both mechanisms. The Article also summarizes the negotiating goals and history of Canada and the United States which resulted in the respective mechanisms and analyzes them in terms of their substantive, procedural, and enforcement provisions. Each of the two main parts concludes with an analysis of how the mechanisms will operate and function in the future. The Article ends with an analysis of how the mechanisms can best be used by Canadian industries and suggests possible future developments.

An agreement is only as good as its dispute resolution mechanism. First, if obligations cannot be enforced, the agreement from which they emanate becomes somewhat useless. If dispute resolution mechanisms cannot guarantee that an agreement will be followed, the agreement becomes meaningless. Second, dispute resolution mechanisms are important in ways beyond the resolution of particular disputes. The way in which parties deal with disputes can affect the overall relationship between the parties. Third, frustration with a dispute resolution mechanism, or continued disagreement with its results, can lead to withdrawal from the entire agreement.

Looking at the world from a Rousseauian perspective, our civilization emerged from a state of chaos with a social contract.³ Disputes in the state of chaos were settled by force. The social contract represented the giving up of a certain amount of individual sovereignty in order to

³ See JEAN JACQUES ROUSSEAU, *Of the Social Contract*, in *THE SOCIAL CONTRACT*, 14, 14-16 (Charles Frankel ed., Hafner Publishing Co. 1947) (n.d.).

reap the benefits of a society based on a common rule of law.⁴ Our court system evolved as a way to determine rights and obligations pursuant to the agreed upon rules. International relations and agreements are currently in the process of evolving from that state of chaos to a society based on the rule of law. International legal agreements are placing more reliance on litigation as opposed to the use of force to resolve disputes.⁵

The submission of disputes to a third party is often a necessary concession in trade agreements. This recognizes that an agreement is only as useful as its dispute resolution mechanism. While intuitive analysis may suggest that stronger parties will be less willing to submit to compulsory, neutral, and third party dispute resolution, it is likely that the wielding of power will become less effective and less beneficial as economies become interdependent.⁶ Even though a country may have more power, it would still be in the country's best interests to enter into a trade agreement. Agreeing to the dispute resolution mechanism may be a necessary concession for getting the other benefits that come with the agreement as a whole.

In international trade, the debate about dispute resolution mechanisms is often centered on whether they should be more legalistic and adjudicatory or more conciliatory and negotiation oriented. Unfortunately, there are few absolutes which are agreed upon. Generally, it is agreed that a dispute resolution mechanism should produce timely and objective decisions and prevent multiple jeopardy and legislation aimed at circumventing mechanism decisions.⁷ However, no dispute resolution mechanism can be detached from the reality of its context. Regardless of what we believe makes a good mechanism, the best mechanism is the one that best serves the attainment of the overall goals of the agreement to which it is attached.⁸ However, even though there are numerous methods of solving disputes, there has been a discernible evolution towards more binding and impartial systems.⁹

⁴ See *id.*; see also Introduction, in THE SOCIAL CONTRACT, *supra* note 3, at ix, ix.

⁵ Cf. Robert E. Hudec, "Transcending the Ostensible": Some Reflections on the Nature of Litigation Between Governments, 72 MINN. L. REV. 211, 212 (1987) (comparing the international arena to "primitive societies" in which litigation is emerging as an alternative to force).

⁶ See Michael Reisman & Mark Wiedman, *Contextual Imperatives of Dispute Resolution Mechanisms: Some Hypotheses and their Applications in the Uruguay Round and NAFTA*, J. WORLD TRADE, June 29, 1995, at 5, 9.

⁷ See Charles M. Gastle, *Policy Alternatives For Reform of the Free Trade Agreement of the Americas: Dispute Settlement Mechanisms*, 26 LAW & POL'Y INT'L BUS. 735, 736 (1995).

⁸ See Reisman & Wiedman, *supra* note 6, at 10.

⁹ See James R. Holbein & Gary Carpentier, *Trade Agreements and Dispute*

II. CHAPTER 19

A. *Negotiating History and Goals*

When discussions for the Free Trade Agreement began in the mid-1980s, there was a "bilateral dismay" with the GATT (1947) dispute resolution mechanism for anti-dumping and countervailing duty issues.¹⁰ The dissatisfaction was the result of the "cumbersome system of committees and rules" that evolved under the consensus approach of GATT (1947).¹¹ Canada was particularly concerned with the non-tariff barriers of United States anti-dumping and countervailing duty law.¹² Canada was concerned that American industries had lobbied for protection, and had already influenced administrative proceedings.¹³ There were also complaints about time delays in addition to the Canadian belief that the Court of International Trade and the Federal Circuit Courts of Appeal were too deferential to agency determinations.¹⁴

To solve these delay problems, Canada proposed that it be exempted from U.S. anti-dumping law. Canada proposed that the negotiations lead to a new regime to apply to each other's goods, which would be based on principles of competition law.¹⁵

The primary U.S. concern was the pervasiveness of Canadian subsidies. The United States wanted to limit the use of such subsidies since they allegedly distorted trade.¹⁶ In the end, the United States was as

Settlement Mechanisms in the Western Hemisphere, 25 CASE W. RES. J. INT'L L. 531, 531 (1993) (stating that trade disputes can be settled by consultation, negotiation, or political persuasion; but the "intractable nature" of trade disputes has led to the development of trade dispute resolution by mediation, conciliation, arbitration, and adjudication).

¹⁰ See Michael Krauss, *The Record of the United States-Canada Binational Dispute Resolution Panels*, 6 N.Y. INT'L L. REV. 85, 85 (1993).

¹¹ *Id.*

¹² See John M. Mercury, *Chapter 19 of the United States-Canada Free Trade Agreement 1989-95: A Check on Administered Protection?*, 15 NW. J. INT'L L. & BUS. 525, 525 (1995).

¹³ See Krauss, *supra* note 10, at 89-90.

¹⁴ See *id.*

¹⁵ See generally Michael Hart, *Dumping and Free Trade Areas*, in ANTIDUMPING LAW AND PRACTICE 336-37 (John H. Jackson & Edwin A. Vermulst eds., 1989) (explaining Canada's proposals during the negotiation of the 1987 Canada-United States Free Trade Agreement).

¹⁶ See Charles M. Gastle & Jean G. Castel, *Should the North American Free Trade Agreement Dispute Settlement Mechanism in Anti-dumping and Countervailing Duty Cases be Reformed in the Light of Softwood Lumber III?*, 26 LAW & POL'Y INT'L

unwilling to exempt Canada from its existing trade law regime as Canada was to limit its ability to subsidize.¹⁷ Although it is possible that the governments and negotiators may have been willing to entertain these ideas, it is unlikely that constituents in either country would have accepted these changes. The negotiations came to a loggerhead. Nevertheless, neither side wanted the negotiations to fail since there was a mutual desire to secure more permanent and comprehensive access to each other's markets. The Chapter 19 mechanism became the compromise solution needed to save the agreement. The Canadians felt that the binational panel system of the review of agency determinations would serve as a check on the largely unfettered discretion of the International Trade Administration and the International Trade Commission.¹⁸ It was agreed that a working group be established to consider more effective subsidies and anti-dumping practices.¹⁹ The Chapter 19 mechanism was intended as a temporary measure until a permanent substantive regime could replace it.²⁰ NAFTA renewed this notion, but it is generally believed that it is currently residing in the dead letter office.

The next sections elaborate on the Chapter 19 dispute resolution mechanism. They illustrate how Chapter 19 functioned and how things may change now as the last of the Free Trade Agreement cases are closed and NAFTA dispute resolution begins. NAFTA incorporated several changes in an attempt to address some of the problems of the Free Trade Agreement system. For instance it had been suggested that the Free Trade Agreement did not achieve an actual meeting of the minds.²¹ The U.S. Congress believed that the binational panels would act exactly as the national judicial review courts would have acted.²² The Canadians, on the other hand, viewed the mechanism as a means to avoid the extreme deference which had been granted to the administrative decisions of the United States.²³

BUS. 823, 829 (1995).

¹⁷ See *id.* at 829.

¹⁸ See Jordan B. Goldstein, *Dispute Resolution Under Chapter 19 of the United States - Canada Free Trade Agreement: Did the Parties Get What They Bargained For?*, 31 STAN. J. INT'L L. 275, 282 (1995).

¹⁹ See Gastle & Castle, *supra* note 16, at 735.

²⁰ See *id.* at 829.

²¹ See Robert E. Burke & Brian F. Walsh, *NAFTA Bi-National Panel Review: Should it be Continued, Eliminated or Substantially Changed?*, 20 BROOK J. INT'L L. 529, 539 (1995).

²² See *id.* at 539.

²³ See Gastle & Castle, *supra* note 16, at 882.

B. Substance

The substantive law examined in this section is not the substance of Chapter 19. Chapter 19 is essentially a procedure-creating mechanism; its provisions are explored under the following section on procedure. The substance analyzed in this section is the law that the bi-national panels apply.

Briefly, under Chapter 19, when a binational panel reviews an agency determination, it does so to determine if it was made in accordance with the anti-dumping and countervailing duty law of the country that made the determination.

Although Canadian and U.S. anti-dumping and countervailing duty laws are derived from the obligations agreed to under the WTO Agreements, there are significant differences in each country's substantive laws. While the WTO establishes treaty obligations which are the same for all nations, countries enjoy significant latitude in interpreting what the WTO requires.²⁴ Thus, the implementing legislation of each country differs in significant ways. For example, Canada and the United States have different definitions and interpretations of material injury, countervailable subsidy, and anti-dumping.

According to Article 1902 (1) of NAFTA:

Each Party reserves the right to apply its anti-dumping law and countervailing duty law to goods imported from the territory of any other Party. Anti-dumping law and countervailing duty law include, as appropriate for each Party, relevant statutes, legislative history, regulations, administrative practice and judicial precedents.²⁵

Article 1904(2) echoes this by stating that when an involved Party requests a panel to review an anti-dumping or countervailing duty determination, the Panel is to "determine whether such determination was in accordance with the anti-dumping or countervailing duty law of the importing party."²⁶ Thus, it is clear that the substantive law with which agencies must comply is the law of their own country.

The above example demonstrates a key distinction of Chapter 19. The analysis conducted under the Chapter 19 mechanism focuses on the administrative decision to determine whether the decision reached was in accordance with the national law. A Chapter 19 panel has no authority to

²⁴ See *Mercury*, *supra* note 12, at 551.

²⁵ North American Free Trade Agreement, Dec. 17, 1992, art. 1902(1), 31 I.L.M. 605 [hereinafter NAFTA].

²⁶ *Id.* art. 1904(2).

question the validity of the national law that was applied. Thus, the Canadian goal of being exempted from U.S. anti-dumping and countervailing duty laws appears to have been foregone. Canadian industries can only use Chapter 19 to challenge U.S. administrative decisions as not being in accordance with U.S. law.

Chapter 19 addresses the Canadian concerns about the Court of International Trade and Federal Circuit Courts of Appeal allowing decisions to stand regardless of whether they were politically motivated, thus showing what Canadians perceived to be excessive deference to the United States. The Chapter 19 process aims to remove the political element by mandating that panels only uphold decisions if they are correctly based on law.

One of the primary concerns with the Chapter 19 dispute resolution mechanism is that its operation will result in the creation of a distinct and divergent body of case law. The concern has increased with the addition of a third country, Mexico. Panels often cite previous panel decisions.²⁷

To say that panelists will not affect the direction of the law is to say that appellate judges have no such effect: both assertions are naive if not nonsensical.²⁸

Since the Chapter 19 process only applies to NAFTA countries, the argument follows that panels may engage in different levels of agency scrutiny than that of the Court of International Trade or the Federal Circuit Courts of Appeal would do when reviewing agency determinations concerning other countries. Thus, even though the underlying legal text will remain the same, there will emerge a different law for NAFTA countries than for non-NAFTA countries. Canada will thus achieve, through NAFTA, what it could not achieve through negotiations. Although a new written law would not have been needed, the concern is that Canada would, to an extent, escape the current U.S. anti-dumping and countervailing duty regime, and become the object of a unique regime with a different level of scrutiny.

NAFTA addresses the concern that countries will try to change their substantive anti-dumping and countervailing duty laws to serve protectionist interests or to circumvent panel decisions. It seeks to lock in laws as they existed at the time of agreement. According to Article 1903, if a Party amends its anti-dumping and countervailing duty laws, and the amendment applies to NAFTA Parties, the affected Parties may request a

²⁷ See Burke & Walsh, *supra* note 21, at 545.

²⁸ Krauss, *supra* note 10, at 91.

binational panel to investigate and issue a declaratory opinion.²⁹ The panel determines whether the law conforms with WTO obligations, overturns a panel decision, or fails to conform to the object and purpose of NAFTA as defined in Article 1902 (2)(d)(ii)³⁰:

[T]o establish fair and predictable conditions for the progressive liberalization of trade between the Parties to this Agreement while maintaining effective and fair disciplines on unfair trade practices, such object and purpose to be ascertained from the provisions of this Agreement, its preamble and objectives, and the practice of the Parties.³¹

If the panel recommends modification of the law, the Parties shall enter consultations to achieve a solution.³² If no corrective action is taken and no solution is agreed upon, the affected Party may enact equivalent measures or terminate the agreement.³³ This mechanism is more bark than bite. Although the mechanism addresses the concern of protectionist legislation and the circumvention of panel decisions, it lacks a workable enforcement mechanism. The option of withdrawing from the agreement within sixty days has little practical difference from the general right to withdraw with six months notice contained in Article 2205.³⁴ Also, the right to enact similar legislation is a statement of the obvious since if one country can change its laws in a particular way, it logically follows that the other Parties may do the same.

It has been suggested that the U.S. regime is more protectionist than the Canadian regime.³⁵ First, before the Subsidies Code of the Uruguay Round, the "United States law with respect to what constitutes a 'countervailable subsidy' was broader in scope than the approach adopted in Canada during the Free Trade Agreement years."³⁶ This allowed the United States to impose countervailing duties against more goods. Second, the definition of "material injury" in the United States set a lower threshold than in Canada, thereby permitting more U.S. petitioners to succeed in illustrating material injury. However, because of Chapter 19's acceptance of each countries' domestic trade law regime, it is not the proper forum for addressing protectionist law. Chapter 19 can only be used to address agency determinations which may be too deferential or

²⁹ NAFTA, *supra* note 25, art. 1903(1).

³⁰ *Id.*

³¹ *See id.* art. 1902(2)(d)(ii).

³² *See id.* art. 1903(3)(a).

³³ *See id.* art. 1903(b).

³⁴ *See id.* art. 2205.

³⁵ *See Mercury*, *supra* note 12, at 551-52.

³⁶ *Id.*

swayed by political considerations. The forum is only used to contest the application of the laws as they stand.

C. Procedure

As previously mentioned, Chapter 19 is a mechanism primarily concerned with procedure. Neither the dispute resolution mechanism itself nor NAFTA contain any substantive law in the anti-dumping and counter-vailing duty area. Chapter 19 is a procedural mechanism intended to supplant the judicial review of agency determinations in the respective NAFTA countries. Therefore, any evaluation of Chapter 19 must begin with and derive from its procedural structure. This section examines various aspects of Chapter 19, including which Parties can appropriately initiate proceedings, the time allowed to complete proceedings and issue panel reports, panel composition, the Extraordinary Challenge Committee mechanism, and the standard of review that panels and the Extraordinary Challenge Committees have applied.

1. Panel Initiation

One of the fundamental differences between Chapter 19 and the WTO dispute resolution mechanism is that Chapter 19 is primarily a mechanism to be used by private Parties. Although governments will always be involved in dispute resolution by virtue of the fact that their agency determinations are being reviewed, private Parties may initiate the process. According to Article 1904(5):

An involved Party on its own initiative may request review of a final determination by a panel and shall, on request of a person who would otherwise be entitled under the law of the importing Party to commence domestic procedures for judicial review of that final determination, request such review.³⁷

Article 1911 defines "involved Party" as, "(a) the importing Party; or (b) a Party whose goods are the subject of a final determination."³⁸ This recognizes the general character of Chapter 19 as a replacement for judicial review. Thus, any Party authorized to initiate judicial review may initiate Chapter 19 panel proceedings.

³⁷ NAFTA, *supra* note 25, art. 1904(5).

³⁸ *Id.* art. 1911.

2. Time Restraints

One of Canada's complaints before the Free Trade Agreement was the length of time it took the Court of International Trade to review final agency determinations. Prior to the Free Trade Agreement, the Court of International Trade took an average of 734 days to complete its review.³⁹ The Free Trade Agreement and NAFTA have significantly reduced the amount of time it takes for review to be completed. According to Article 1904(14), final decisions are to be reached within 315 days of the date on which a request for a panel is made.⁴⁰ While the Free Trade Agreement was in force, Chapter 19 panels issued initial decisions within 360 days.⁴¹ Although Court of International Trade procedures have since been implemented to speed up the review process, Chapter 19 still presents an expeditious dispute resolution mechanism.

NAFTA is, however, hampered by the remand process. Article 1904(8) states that a "panel may uphold a final determination, or remand it for action not inconsistent with the panel's decision."⁴² Panels cannot simply reverse agency determinations. Allowing such a replacement provision would effectively permit panels to substitute their own findings for those of the agency. The result has been that agencies often try to maintain the result of their determination while attempting to make it conform with the panel's decision. This has often resulted in second, more strongly worded remands where panels have made their findings specific enough to force the agency to comply. Reversals are not allowed formally, except through narrowly worded remands. Panels have interpreted Article 1904(8) as giving them the power to issue final remands.⁴³ These typically enumerate compliance requirements. The ability to terminate adjudication after a second remand had a disciplining effect, particularly on the U.S. agencies.⁴⁴ Regardless of the ability to ultimately issue final remands, the remand procedure has negated some of the time advantage of the Chapter 19 process.

³⁹ See United States General Accounting Office, United States-Canada Free Trade Agreement: Factors Contributing to Controversy and the Appeal of Trade Remedy Cases to Bi-National Panels, (GAO/GGD-95-175 BR), Washington, D.C., June 16, 1995, at 57-58 [hereinafter GAO Study].

⁴⁰ NAFTA, *supra* note 25, art. 1904(14).

⁴¹ See Mercury, *supra* note 12, at 542.

⁴² NAFTA, *supra* note 25, art. 1904(8).

⁴³ *Id.* art. 1904(8).

⁴⁴ See Mercury, *supra* note 12, at 543.

Nevertheless, the length of time to reach final decisions is shortened by the fact that there is no traditional appeal process in NAFTA. Under the Free Trade Agreement, Extraordinary Challenge Committee proceedings had to be completed within thirty days. NAFTA extends this to ninety days, but this still represents a relatively short period of time.⁴⁵ Even if NAFTA were to replace the Extraordinary Challenge Committee with a more common appeal process, it is likely that this ninety day period would be sufficient. This is the maximum amount of time the appeal process is allotted in the WTO.⁴⁶

3. Panel Composition

The composition of Chapter 19 panels is unique. There are no barriers to establishing panels as there were in GATT (1947). Annex 1901.2 sets out the procedures for establishing a panel.⁴⁷ The Parties to the agreement are each to maintain rosters of twenty-five individuals.⁴⁸ Within thirty days of a request for a panel, each Party shall choose two panelists, usually from the roster.⁴⁹ Within another twenty-five days, the Parties must agree on a fifth panelist, and, if no agreement is reached, the Parties draw lots and the winner gains the right to select the fifth panelist.⁵⁰ The panelists then choose their own chairperson from the lawyers on the panel.⁵¹

a. Trade Experts

According to Annex 1901.2 (1), the people selected to be on each Party's roster, "shall be of good character, high standing and repute, and shall be chosen strictly on the basis of objectivity, reliability, sound judgement and general familiarity with international trade law."⁵² In addition, a majority of panelists must be lawyers in good standing.⁵³ The

⁴⁵ NAFTA, *supra* note 25, annex 1904.13.

⁴⁶ See generally Understanding, *supra* note 1 (stating that 60 days is allowed from notification to panel report circulation and the panel can extend this to a maximum of 90 days).

⁴⁷ NAFTA, *supra* note 25, annex 1901.2 (stating the requirements for panel members, including objectivity, reliability, sound judgment, familiarity with international trade law, a majority being lawyers in good standing).

⁴⁸ See *id.* annex 1901.2(1).

⁴⁹ See *id.*

⁵⁰ See *id.* annex 1901.2(3).

⁵¹ See *id.* annex 1901.2(4).

⁵² *Id.* annex 1901.2(1).

⁵³ *Id.* annex 1901.2(2).

rationale behind the use of "trade experts" as panelists is that these people are familiar with the law and can infuse the process with their knowledge and expertise. This seems to be in accord with the Canadian goal of depoliticizing the process.

It has been generally felt that the use of trade experts has led to well-reasoned decisions.⁵⁴ This is probably the result of the level of knowledge and experience of the panelists. It is also possible that people given adjudicatory authority for the first time take the task seriously and are very conscientious of their duty. It has been suggested by Judge Wilkey, an American who served on the *Softwood Lumber III* Extraordinary Challenge Committee, and others, that non-judges are not attuned to matters of jurisdiction and are more willing to substitute their own conclusions for those of agencies as opposed to granting the required degree of deference.⁵⁵ While the panel reports demonstrate that panels have been aware of and are attentive to matters of jurisdiction, they have often refused to be deferential to unsupported agency determinations.⁵⁶

The United States has been concerned with the lack of deference which panels have shown to its agencies' determinations.⁵⁷ This concern is not unfounded. In examining U.S. agency final determinations, panels have constructed a relatively strong standard of review that often results in reversal.⁵⁸

To address this problem, the United States negotiated for, and had a clause added to, Annex 1901.2(1) stating that each party's roster of panelist candidates "shall include judges or former judges to the fullest extent practicable."⁵⁹ The United States Statement of Administrative Action highlights the benefits which it expects this change to bring about:

[T]he participation of panelists with judicial experience would help to ensure that, in accordance with the requirement of Article 1904, panels review determinations of the administering authorities precisely as would a court of the importing country by applying exclusively that country's AD and CVD law and its standard of review. In addition, the involvement of judges in the process would diminish the possibility that panels and courts will develop distinct bodies of U.S. law.⁶⁰

⁵⁴ See, e.g., *Mercury*, *supra* note 12, at 598.

⁵⁵ *In re Certain Softwood Lumber Products from Canada*, No. ECC-94-1904-01 USA, at 58 (Extraordinary Challenge Committee Proceeding, Aug. 3, 1994) (Wilkey, J., dissenting).

⁵⁶ See *Mercury*, *supra* note 12, at 598.

⁵⁷ See NAFTA Implementation Act, 19 U.S.C. § 3311 (1988 & 1997 Supp.).

⁵⁸ See *id.*

⁵⁹ NAFTA, *supra* note 25, annex 1901.2(1).

⁶⁰ Statement of Administrative Action to the North American Free Trade Agreement

The U.S. position is that judges are more attentive to questions of jurisdiction and will be less likely to substitute their own conclusions for those of the agencies. However, Canada has stated that it intends to continue its emphasis on international trade expertise as a central consideration in its choice of roster members.⁶¹ Although the United States bargained for this change, it has yet to appoint any judges to its roster, while Canada has already done so.

If and when more judges are appointed to NAFTA panels, it is possible that a more deferential approach will emerge. Although this may be more in line with the U.S. goal of having panels act like reviewing courts, it may make the Chapter 19 process a less innovative dispute resolution mechanism.

b. The Extraordinary Challenge Committee

There is no appeal, in a conventional sense, from bi-national panel decisions. Typically, appeals consist of an examination of the legal and, at times, factual conclusions of a lower body. The focus of the Extraordinary Challenge Committees is much narrower. One of the benefits of the absence of a traditional appeal route in Chapter 19 is the time saved when compared to the process used by the Court of International Trade. The only avenue of complaint about a panel decision is the Extraordinary Challenge Committee procedure. This part of the mechanism is unique in the world of international trade disputes.

Annex 1904.13(1) states that Extraordinary Challenge Committees shall be comprised of three members, all being judges or former judges.⁶² Each Party selects five people to be on its roster and each Party chooses one member of the committee with the winner of a lot picking the third member.⁶³ According to Article 1904(13), in order to appeal to an Extraordinary Challenge Committees, it must be alleged that:

- (a)(i) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct,
- (ii) the panel seriously departed from a fundamental rule of procedure,
- or

Implementation Act, H.R. DOC. NO. 103-159, at 195 (1993).

⁶¹ See North American Free Trade Agreement Canadian Statement on Implementation, 1 NORTH AMERICAN FREE TRADE AGREEMENTS (James R. Holbein & Donald J. Musch eds., 1994).

⁶² NAFTA, *supra* note 25, annex 1904.13(1).

⁶³ *Id.*

(iii) the panel manifestly exceeded its powers, authority or jurisdiction set out in this Article, *for example by failing to apply the appropriate standard of review*, and

(b) any of the actions set out in subparagraph (a) has materially affected the panel's decision and threatens the integrity of the bi-national panel review process⁶⁴

There have only been three Extraordinary Challenge Committee panels, all under the Free Trade Agreement.⁶⁵ They all held that the Extraordinary Challenge Committee is not an appellate body and, therefore, does not review routine allegations of errors.⁶⁶ The committees appear to have taken the words "extraordinary challenge" quite seriously in establishing a very high threshold for Extraordinary Challenge Committee review.

The standard of review clause was not in the Free Trade Agreement, but was added to NAFTA at the request of the United States.⁶⁷ The general sentiment in the United States, echoed and crystallized by Judge Wilkey's Extraordinary Challenge Committee dissent in *Softwood Lumber III*, is that panels have often failed to apply the appropriate standard of review.⁶⁸ This controversy is made clear by the fact that most panel dissents concern the standard of review employed.⁶⁹ The United States contends that the addition of the standard of review clause allows Extraordinary Challenge Committees to probe more deeply into the reasoning of panels and to explicitly examine standard of review issues. The call for more scrutiny at the Extraordinary Challenge Committee level appears to be a response to the unexpected lack of deference at the bi-national panel level. The Canadian government contends that the amendment only explains what was already implicit in the agreement, and therefore, no change in the Extraordinary Challenge Committee level of review should be expected.

⁶⁴ *Id.* art. 1903(13)(a)-(b) (emphasis added).

⁶⁵ See *In re Fresh, Chilled or Frozen Pork from Canada*, ECC-91-1904-01-USA (Appeal of USA-89-1904-11) (June 14, 1991); *In re Live Swine from Canada*, ECC-93-1904-01-USA (Appeal of USA-91-1904-03) (Apr. 8, 1993); *In re Certain Softwood Lumber Products from Canada*, ECC-94-1904-01-USA (Appeal of USA-92-1904-01) (Aug. 3, 1994).

⁶⁶ See Gastle & Castel, *supra* note 16, at 850.

⁶⁷ See NAFTA Implementation Act, 19 U.S.C. § 3311 (1988 & 1997 Supp.) (describing addition of standard of review clause).

⁶⁸ *In re Certain Softwood Lumber Products from Canada*, No. ECC-94-1904-01 USA, at 57 (Extraordinary Challenge Committee Proceeding, Aug. 3, 1994) (Wilkey, J., dissenting).

⁶⁹ See Mercury, *supra* note 12, at 538.

It may also be significant that Extraordinary Challenge Committee decisions under the Free Trade Agreement were to be rendered within thirty days. Under NAFTA, this has been extended to ninety days.⁷⁰ Although this says nothing in and of itself, future Extraordinary Challenge Committee panels may interpret it as an indication of the intent of the parties that review by the Extraordinary Challenge Committee be more thorough than it was under the Free Trade Agreement. Moreover, the change in the grounds for appeal to the Extraordinary Challenge Committee suggests a shift to a more typical appellate court proceeding.⁷¹

c. Nationality

For the integrity of a dispute resolution mechanism to be maintained, its decisions must be made in a fair and objective way by neutral arbiters. For people or nations to confidently submit themselves to the authority of a third party, they must have a degree of faith in the third party's judgement. The nationality of panelists is an obvious area of concern for international decision-makers like these bi-national panels. Assuming panelists make honest attempts to be objective, there is still a concern with national bias. It is a natural reaction for people to be more sympathetic and understanding of the position of the party who is most similar to themselves. Participants and other observers are always aware of the possibility of national bias and keep a watchful eye for it. The issue can be explosive regardless of the actual presence of national bias.

Generally, Chapter 19 panels have not split along national lines. However, the recent nationality split in both the *Softwood Lumber III* panel and the Extraordinary Challenge Committee has sparked debate about the impact of panelist nationality.⁷² Both the five-member panel and the three-member Extraordinary Challenge Committee were composed of a majority of Canadians who all found in favor of Canadian industry, and essentially overturned the U.S. agency determinations.⁷³ The two

⁷⁰ NAFTA, *supra* note 25, annex 1904.13(2); *see also* NAFTA Implementation Act, 19 U.S.C. §§ 3311. (1988 & 1997 Supp.) ("tripling the length of time available to the ECC to undertake its review").

⁷¹ *See* Mercury, *supra* note 12, at 600.

⁷² *See* Gastle & Castle, *supra* note 16, at 825-27 (discussing how Judge Wilkey's dissent has fed U.S. criticism of the Chapter 19 mechanism, including panelist nationality); *see also* Burke & Walsh, *supra* note 21, at 59; *see generally* Barbara Bucholtz, *Sawing Off the Third Branch: Precluding Judicial Review of Anti-Dumping and Countervailing Duty Assessments Under Free Trade Agreements*, 19 MD. J. INT'L L. & TRADE 175 (1995).

⁷³ *See generally* *In re* Certain Softwood Lumber Products from Canada, USA-92-1904-01 (May 6, 1993 and Dec. 17, 1993); *In re* Certain Softwood Lumber Products

Americans on the panel, and the sole American on the Extraordinary Challenge Committee, Judge Wilkey, supported the agency determinations in dissent. This clear split along national lines added much fuel to the national bias debate. The issue also gained considerable attention because of the importance of the lumber trade between the two nations and the long history of the dispute.

It is important to note that *Softwood Lumber III* is the first dispute in which both the panel and the Extraordinary Challenge Committee split along national lines.⁷⁴ An examination of the results of all disputes under Chapter 19 demonstrates a remarkable degree of unanimity of panel results.⁷⁵ In particular, where panels have been reviewing U.S. agency determinations, they frequently agreed upon whether the determination should be affirmed or remanded.⁷⁶ There appears to be little evidence for any assertions of a systemic problem of national bias.

The nationality debate was focused upon and most ardently advanced by Judge Wilkey. Judge Wilkey did not directly attack the credibility or veracity of the Canadian panelists or Committee members. However, he argued that the Canadians, because of their different backgrounds and legal training, could not fully appreciate the nuances of U.S. administrative law, and thus were ill-equipped to review U.S. agency determinations.⁷⁷

Judge Wilkey's position is somewhat untenable in light of evidence which demonstrates that panel decisions are often unanimous and rarely split along national lines. However, he has highlighted the one area where nationality has been linked to decisions. In most of the cases where dissenting opinions have been delivered, the applicable standard of review has typically been the issue of contention. These divisions were usually along national lines.⁷⁸

The overall unanimity of panel decisions suggests that there is not a general problem with national bias. There does, however, appear to be a problem with the disagreement about the appropriate standard of review.

from Canada, ECC-94-1904-01 USA (Aug. 3, 1994).

⁷⁴ See Gastle & Castel, *supra* note 16, at 876.

⁷⁵ See *id.*

⁷⁶ See Mercury, *supra* note 12, at 537-38.

⁷⁷ *In re* Certain Softwood Lumber Products from Canada, No. ECC-94-1904-01 USA, at 58 (Extraordinary Challenge Committee Proceeding, Aug. 3, 1994) (Wilkey, J., dissenting).

⁷⁸ See Mercury, *supra* note 12, at 538.

4. Standard of Review

According to Article 1904(3), bi-national panels apply both the law of the country whose agency made the determination under review and that country's standard of review:

The panel shall apply the standard of review . . . and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.⁷⁹

When an agency decision undergoes judicial review, a standard of review is set out so the reviewing court has a guide as to how much deference it is to afford the agency determination in question. Canada, the United States, and Mexico all have different standards of review for their various agencies' determinations. These different standards of review have resulted in different results at the bi-national level.

A recent study has concluded that far more U.S. agency determinations were overturned by bi-national panels than Canadian determinations.⁸⁰ Part of the reason for this discrepancy is the highly deferential standard applicable to Canadian International Trade Tribunal determinations. The Canadian International Trade Tribunal is responsible for determining if a product has been dumped or unfairly subsidized. Revenue Canada determines if the domestic industry has been materially injured.⁸¹

There is an element of Canadian administrative law known as a privative clause.⁸² A privative clause acts to insulate the decisions of specialized agencies from judicial review. The decisions of agencies with a high degree of expertise are upheld unless they are "patently unreasonable."⁸³ As a result, many disputable Canadian International Trade Tribunal determinations have been upheld by panels.⁸⁴ The Canadian International Trade Tribunal's privative clause has been repealed.⁸⁵ However, in a non-trade related case, the Supreme Court of Canada concluded that even in the absence of a privative clause "considerable deference" should still be afforded to expert tribunals.⁸⁶ Thus it is un-

⁷⁹ NAFTA, *supra* note 25, art. 1904(3).

⁸⁰ See Mercury, *supra* note 12, at 535-36.

⁸¹ See Special Imports Measures Acts, R.S.C., ch. s-15 (1985) (Can.).

⁸² Section 28(1) was the clause that affected CITT final determinations during the Free Trade Agreement. See Federal Court Act, R.S.C., ch. f-7 (1985) (Can.).

⁸³ See United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd., [1992] S.C.R. 316.

⁸⁴ See Mercury, *supra* note 12, at 557.

⁸⁵ See Reisman & Wiedman, *supra* 6, at 5, 9.

⁸⁶ See Pezim v. British Columbia (Superintendent of Brokers), [1994] S.C.R. 557,

likely that Canadian International Trade Tribunal determinations will undergo the level of scrutiny to which Internal Trade Administration determinations have been subject.

In addition to the high level of deference given to the Canadian International Trade Tribunal, panels often applied conflicting judicial interpretations as to the proper U.S. standard, and constructed a stringent review standard, resulting in the reversal of several U.S. agency determinations.⁸⁷ In contrast, the final injury determinations of Revenue Canada and the International Trade Commission generally withstood panel review.⁸⁸

It remains to be seen how the additional clause in the NAFTA Extraordinary Challenge Committee grounds for remand will affect panel decisions and the Extraordinary Challenge Committee process. There is obviously a significant amount of debate over the correct standards of review. The first problem seems to be the willingness of panels to interpret the U.S. standard as one of less deference while the standard to be applied to Canadian International Trade Tribunal determinations is interpreted as highly deferential. This may result in panels overturning more U.S. decisions and lowering U.S. duty findings, but this may not be inconsistent with NAFTA. Since both countries retain their own anti-dumping and countervailing duty laws and attendant standards of review, disparate results should be expected.

D. Enforcement

Any trade agreement is only as good as the level of the Parties' compliance with it. If Parties are unwilling to be bound by their agreement, then the agreement is meaningless. Parties often voluntarily submit themselves to the authority of a binding dispute resolution mechanism as it is one of the only mechanisms that can assure compliance. Thus, enforcement and implementation of panel reports are central to the success of an agreement.

With respect to enforcement, Chapter 19 once again distinguishes itself as unique. The relevant provisions are contained in Article 1904.⁸⁹ The bi-national panels completely replace national judicial review of final anti-dumping and countervailing duty determinations.⁹⁰ Once an involved

598-99 (deferring to the British Columbia Securities Commission because of its specialization of duties and role as policy developer in the securities industry).

⁸⁷ See *Mercury*, *supra* note 12, at 553.

⁸⁸ See *id.* at 552-53.

⁸⁹ See generally NAFTA, *supra* note 25, art. 1904 (describing the review of final anti-dumping and countervailing duty determinations).

⁹⁰ *Id.* art. 1904(1) (stating that "each Party shall replace judicial review of final

Party requests a panel, the final determination cannot be reviewed under national judicial review procedures.⁹¹ The panels can affirm or remand agency determinations and can issue final remands.⁹² Panel decisions cannot be appealed to domestic courts. Article 1904(9) states that "[t]he decision of a panel under this Article shall be binding on the involved Parties with respect to the particular matter between the Parties that is before the panel."⁹³

Although there has been considerable debate about the efficacy and merits of Chapter 19, there has never been a problem with compliance with panel reports. All panel and Extraordinary Challenge Committee findings have been followed by the respective agencies.⁹⁴

A cloud hanging over the Chapter 19 dispute resolution mechanism is the possibility of a constitutional challenge in the United States. Constitutional concerns are related to the separation of powers, the appointment of non-Article III judges, and due process. Although NAFTA provides for constitutional review of the bi-national panel process, there are significant "legal barriers that discourage Parties from seeking judicial review."⁹⁵ For example, NAFTA requires the Party filing the constitutional challenge to pay the opponent's attorneys' fees if the challenge fails.⁹⁶ Also, pursuant to an executive order of President Reagan, the President accepts, as a whole, all decisions of the Chapter 19 dispute resolution mechanism even if a U.S. court has declared the process unconstitutional.⁹⁷ These and other factors have "undermine[d] the likelihood, and perhaps the effectiveness, of judicial review of the panel system."⁹⁸

E. Chapter 19 Analysis and Conclusions

The Chapter 19 experiment has been nothing if not interesting. It has sparked considerable debate and discussion not only concerning trade

anti-dumping and countervailing duty determinations with bi-national panel review).

⁹¹ *Id.* art. 1904(1)-(2).

⁹² *Id.* art. 1904.

⁹³ *Id.* art. 1904(9).

⁹⁴ NAFTA article 1904(9) states that panel decisions are binding on the parties, while article 1904(11) states that reports are not subject to judicial review and that no appeals in domestic courts are allowed. Article 1904.13(13) then states that ECC reports are binding on the parties. *Id.* art. 1904.

⁹⁵ Robert P. Deyling, *Free Trade Agreements and the Federal Courts: Emerging Issues*, 27 ST. MARY'S L. J. 353, 379 (1996).

⁹⁶ *See id.*

⁹⁷ *See id.* at 380.

⁹⁸ *Id.* at 357.

between Canada and the United States, but also about dispute resolution in general. It is arguable that the mechanism has been advantageous.

The quality of panel decisions has generally been exemplary. Panel decisions tend to be well-written and well-reasoned, helping to inform interested persons as to why certain decisions were reached. This forestalls various criticisms about decisions being arbitrary or based on bias. Panel decisions have generally been unanimous, non-partisan, depoliticized, and have provided a check on agency actions. The mechanism has achieved one of its primary goals of resolving disputes in a relatively short period of time. Although this quickness was hampered to a certain extent by the remand process, a rule of finality developed to limit the time hemorrhage.

One of the primary concerns about Chapter 19 is the development of a distinct body of law for NAFTA countries. Although panels have cited other panel reports, there is no conclusive evidence that a separate jurisprudence has emerged.⁹⁹ Concern remains that as the body of panel decisions builds it will have an unprecedented effect on reports. This should, however, be held in check by the continued existence and evolution of the non-NAFTA jurisprudence. The NAFTA countries continue to have trade disputes with other nations. These disputes wind their way through each country's judicial review process. The use of those decisions as a yardstick should serve as a check on NAFTA reviews.

Although the Canadians did not obtain the exemption from U.S. trade law that they were seeking, Canadian exporters have done reasonably well under Chapter 19. The mechanism has resulted in some relief from U.S. trade law by requiring the International Trade Administration and the International Trade Commission to be more disciplined in their determinations.¹⁰⁰ The Mercury study cites the following factors as having contributed to the disparity of results of Free Trade Agreement decisions in favor of Canadian exporters:

- (i) A relatively flexible United States "standard of review" which, when applied by panelists, could be used to effectively overturn agency determinations;
- (ii) The existence of a "privative" clause which, when combined with Canada's in-grained judicial predisposition toward "deference," protected the Canadian International Trade Tribunal from exacting panel review;
- (iii) Panel ability to invoke a rule of "finality" which effectively limited further opportunity for U.S. domestic agencies to re-formulate and support their conclusions;

⁹⁹ See GAO Study, *supra* note 39, at 83.

¹⁰⁰ See Mercury, *supra* note 12, at 527.

- (iv) A high threshold which had to be surmounted if panel decisions were to be successfully challenged before Extraordinary Challenge Committees;
- (v) The use of international trade lawyers and economists as panelists; and
- (vi) A consistent effort on the part of panelists reviewing U.S. agency final determinations to formulate and apply an unyielding standard of review, both in initial panel opinions and in subsequent judgments.¹⁰¹

On average, Free Trade Agreement panels reduced the duty to be applied by the International Trade Administration by 28.2%.¹⁰² In contrast, the United States has had limited success in challenging Canadian agency determinations.¹⁰³ The disparity of outcomes may be a result of the different standards of review as stated and applied, but could also stem from Canadian determinations being more detailed and supported than U.S. determinations. However, regardless of whether there are valid reasons for the disparity, the fact that disparity exists no doubt contributes to U.S. criticism of the mechanism.

The changes of NAFTA may serve to correct the disparity of results. NAFTA duplicates most of Chapter 19 and simply applies it on a trilateral basis to include Mexico. As of yet, the mechanism appears to have functioned much as it did under the Free Trade Agreement.¹⁰⁴ However two changes could lead to significant differences. First, an increased number of judges on a panel could lead to panels being more deferential to agency determinations. Second, the specific inclusion of standard of review misapplication as an example of a panel exceeding its power, authority, or jurisdiction may affect the level of deference given. Although these changes do not appear to be influencing panel decisions in themselves, the real test will be at the Extraordinary Challenge Committee level. As of yet there have been no NAFTA Extraordinary Challenge Committee appeals. This addition to the Extraordinary Challenge Committee's terms, coupled with tripling the amount of time Extraordinary Challenge Committees are given to complete their review may lead to less deferential Extraordinary Challenge Committees. This could result in a check being placed on panel decisions which are not sufficiently deferential. It is possible that these changes may have no effect whatsoever.

¹⁰¹ *Id.* at 596-97.

¹⁰² *See id.* at 529.

¹⁰³ *See id.* at 550.

¹⁰⁴ *See id.* at 601.

er on Chapter 19 review. However, it is also possible that the mechanism could move back towards the traditional judicial review.¹⁰⁵

In addition to the possible move back towards a more traditional and deferential style of review, the disparity of results, and the possibility of the emergence of a distinct NAFTA jurisprudence, there are other remaining shortcomings of the mechanism. Chapter 19 only addresses the procedural shortcomings of the current system, and leaves the underlying problem of the trade laws themselves untouched.

Chapter 19 is not an end-all mechanism. The mechanism is somewhat temporary in that an exporter can still be subject to successive Chapter 19 proceedings in the future for the same type of goods. Chapter 19 simply serves as a review process for agency determinations. After the process is over, nothing precludes a domestic industry from launching another complaint at the national level which can result in anti-dumping or countervailing duty penalties. An exporter has no recourse except to appeal the new findings to another Chapter 19 panel.

Furthermore, the new panel is not bound by the findings of the first panel, and could find against the exporter. This problem is demonstrated by the Softwood Lumber dispute. There have been three Chapter 19 proceedings based on essentially the same facts.¹⁰⁶ The U.S. industry has been relentless, and essentially pledged to continue the fight until it receives a just result. Recently, an agreement was signed respecting the volume of Canadian softwood that will be allowed into the United States without additional duties.¹⁰⁷ Under the agreement, the U.S. industry has agreed not to launch another trade action for five years, the duration of the agreement.¹⁰⁸ Critics have pointed to this dispute as a failure of the Chapter 19 mechanism.¹⁰⁹ However, the mechanism has proved to han-

¹⁰⁵ See *id.*

¹⁰⁶ U.S. industries have brought two cases to Chapter 19 panels both of which required remands and one which required an Extraordinary Challenge Committee. See *In re* Certain Softwood Lumber Products from Canada, USA-92-1904-01 (May 6, 1993); *In re* Certain Softwood Lumber Products from Canada, USA-92-1904-01 (Dec. 17, 1993) (remand issued); *In re* Certain Softwood Lumber Products from Canada, ECC-94-1904-01 (Aug. 3, 1994); *In re* Softwood Lumber from Canada, USA-92-1904-02 (July 26, 1993); *In re* Softwood Lumber from Canada, USA-92-1904-02 (Jan. 29, 1994) (remand issued); *In re* Softwood Lumber from Canada, USA-92-1904-02 (July 6, 1994) (remand issued). It was the threat of another such action which led to the signing of the Memorandum of Understanding currently in place that imposes a quota on softwood lumber from Canada.

¹⁰⁷ See Canada - United States Softwood Lumber Agreement, May 29, 1996, U.S.-Can., 35 I.L.M. 1195.

¹⁰⁸ *Id.*

¹⁰⁹ See Gastle & Castle, *supra* note 16, at 881-82; Mercury, *supra* note 12, at 604.

dle many of the disputes in an effective way. Perhaps the Softwood Lumber Dispute is simply too big for the mechanism, but the mechanism is sufficient in most circumstances.

The most fundamental problem with Chapter 19 is its limited scope. As already stated, the mechanism does nothing to address the problems of the trade laws themselves. It can be argued that the laws are protectionist and should be replaced. The mechanism may serve to place a check on the non-tariff barrier of agency determinations. However, Chapter 19 can only strive to assure that determinations are arrived at in accordance with the law as it currently stands. Complaints about the laws must be voiced in a different forum.

F. The Future of Chapter 19

There are numerous possibilities for the future of the Chapter 19 dispute resolution mechanism. The first possibility is to do nothing and let the mechanism operate as is. This appears to be the path the Parties are currently following, and likely will for some time. There has not yet been enough experience with the NAFTA version of Chapter 19 to make informed judgements. It may perform exactly as its Free Trade Agreement predecessor did, or there may also be significant differences. It is simply too early to tell.

Another possibility is to abandon the mechanism altogether and revert to national judicial review. Judge Wilkey and other critics of the process have suggested this alternative.¹¹⁰ Although this is possible, governments do not appear ready to abandon the Chapter 19 mechanism. This option may become more viable if the criticisms of the Free Trade Agreement mechanism turn out not to be remedied by the NAFTA amendments.

The formation of a regular appellate body would be a significant step. Although the amendments to the Extraordinary Challenge Committee provisions suggest a move to a more typical appellate procedure, it is still a different entity. A regular appellate body could help to alleviate much of the criticism directed at the bi-national panels. If Parties had a regular appeals process, there would be a means for fuller venting of complaints and a reduction of the risk of "wrong" decisions. An appeal body would lend credibility to the mechanism, and interested groups might be more

¹¹⁰ See *Should the NAFTA Chapter 19 Dispute Settlement Mechanism of Ad Hoc Panels be Continued or Extended to Other Countries: Before the Subcommittee on Trade of the Committee on Ways and Means of the House of Representatives* (June 21, 1995) (written testimony of Malcolm R. Wilkey, retired U.S. Circuit Judge), available in 1995 WL 371096; see also Burke & Walsh, *supra* note 21, at 560-61.

willing to accept decisions that have been subjected to a second examination.

The mechanism could take a step into the substantive sphere by expanding the provisions with respect to reviewing new legislation, particularly those aimed at overturning panel decisions.¹¹¹ Protectionist changes could be deemed to be not applicable to NAFTA countries.

It is apparent that much of the controversy regarding the mechanism concerns the interpretation and application of the correct standard of review. The only other issue which has sparked as much controversy is the nationality of panelists. However, nationality only became an issue with respect to the standard of review. Although it is highly unlikely that the United States would exempt its NAFTA partners from its trade laws, a step in the right direction may be the harmonization of the standards of review. Although this is outside the current rubric of the law of each country being applied as is, it may represent a productive compromise. The standards of review in the countries are more similar than not.¹¹² By agreeing on a harmonized standard of review, the issue of the amount of deference to be applied could be directly addressed for all Chapter 19 cases.

III. WTO DISPUTE RESOLUTION MECHANISM

The GATT dispute resolution mechanism has evolved significantly since its inception. When the GATT was first founded, disputes went to working groups. Only after a few years was the idea of formal panels and reports implemented.

Numerous complaints and dissatisfactions with the GATT (1947) dispute resolution mechanism led to the changes implemented during the Uruguay Round. GATT (1947) procedures and practice developed on an *ad hoc* basis, and were formalized in the Tokyo Round.¹¹³ However, the mechanism remained incomplete. The main stumbling block was the consensus approach. Consensus of all Contracting Parties was necessary for the establishment of panels and the adoption of their reports. This

¹¹¹ See Gastle & Castel, *supra* note 16, at 885 (discussing changes in trade laws due to NAFTA, the Canadian Internal Trade Agreement, and the WTO); *id.* at 893 (discussing WTO standards of appellate review).

¹¹² The Canadian standard can be found in § 28(1) of the Federal Court Act, R.S.C. ch. f-7 (1985) (Can.). The U.S. standard is located at 19 U.S.C. § 1516a(b)(1)(B) (1988). Although there are many similarities between the two standards, it has been pointed out that the Canadian standard is somewhat narrow, and therefore affords more deference to agency determinations. See Mercury, *supra* note 12, at 551-54.

¹¹³ See generally Robert E. Hudec, *GATT Dispute Settlement after the Tokyo Round: An Unfinished Business*, 13 CORNELL INT'L L.J. 145 (1980).

impediment was eventually removed for panel establishment, but remained for adoption of reports. Losing Parties often acquiesced to adoption because of international pressure and a need to preserve the GATT as a whole. However, many reports were never adopted as losing Parties could withhold their consent; thus blocking adoption. There were also complaints about the time it took to arrive at a panel report and the implementation of reports. The general dissatisfaction with the GATT (1947) dispute resolution mechanism was one of the incentives for launching the Uruguay Round.¹¹⁴

The myriad of complaints and frustrations about the GATT (1947) dispute resolution mechanism included: a long and unproductive consultative phase; barriers to the establishment of panels; a long panel process; unsound panel decisions; the blocking of panel reports; and the lack of enforcement of adopted panel reports. The GATT very often served as more of a forum for discussion and a platform for negotiations. The United States led the charge to a more legalistic system, as it felt a more judicial approach would create greater certainty and U.S. rights would be more readily enforced.¹¹⁵

The U.S. dissatisfaction with the mechanism led to its increasing use of unilateral action, primarily under section 301, to achieve its trade objectives.¹¹⁶ The rest of the world denounced these actions and insisted that disputes be solved in the multilateral forum:

Section 301's successful application by the United States induced foreign capitals around the world to see GATT dispute settlement procedures in a new light, as a way to discipline United States unilateralism

Thus, the aggressive use of section 301 ultimately created the climate of widespread political support for the GATT dispute settlement proposals authored by the United States. Ironically, the United States, the chief champion of the international rule of law, succeeded in its advocacy for a stronger, more effective dispute settlement system, based upon the rule of law, because the United States itself was increasingly perceived as an

¹¹⁴ See Holbein & Carpentier, *supra* note 9, at 536; see also *Ministerial Declaration on the Uruguay Round*, Sept. 20, 1986, GATT B.I.S.D. (33d Supp.) at 19, 25 (1987) [hereinafter *GATT Ministerial Declaration*]; Michael K. Young, *Dispute Resolution in the Uruguay Round: Lawyers Triumph Over Diplomats*, 29 INT'L LAW. 389 (1995).

¹¹⁵ See Judith H. Bello & Alan F. Holmer, *U.S. Trade Law and Policy Series No. 24: Dispute Resolution in the New World Trade Organization: Concerns and Net Benefits*, 28 INT'L LAW. 1095, 1097 (1994).

¹¹⁶ See *id.* at 1100-02.

international scofflaw, acting in its self-interest without regard to international law, rules, or agreements.¹¹⁷

The United States had primarily been involved in GATT dispute settlement as an injured party. Frustration revolved around the procedural barriers to the adoption and enforcement of panel reports. One of the central U.S. negotiating objectives in the Uruguay Round was the congressionally mandated goal of improved dispute settlement.¹¹⁸ The U.S. demand for stronger enforcement was based on a "deeply rooted sort of self-righteousness."¹¹⁹

Even before the changes of the Uruguay Round, the increased use of the GATT (1947) dispute resolution mechanism was paralleled by an attendant judicialization of the procedures.¹²⁰ The judicialization continued as the Uruguay Round made GATT dispute resolution far more adjudicatory and legalistic.¹²¹ GATT increased countries' economic interdependence, causing people and industries to have a more direct stake in international trade. Interdependence, in turn, led to more widespread public scrutiny of GATT dispute resolution. As the audience broadened, results were measured against the only yardstick people had for comparison: national courts. This led to the desire for a more judicialized mechanism.

A. Improvements to GATT

The Uruguay Round made fundamental changes to the GATT (1947) dispute resolution mechanism by moving towards a more judicial approach. The changes included the automatic establishment and adoption of panel reports.¹²² The consensus approach was the main stumbling block in GATT (1947). Under the WTO dispute resolution mechanism, panels are automatically established,¹²³ and their reports adopted unless there is

¹¹⁷ *Id.* at 1101-02.

¹¹⁸ *See id.* at 1097

¹¹⁹ Robert E. Hudec, *The Judicialization of GATT Dispute Settlement*, in *IN WHOSE INTEREST? DUE PROCESS AND TRANSPARENCY IN INTERNATIONAL TRADE* 9, 18 (Michael M. Hart & Debra P. Steger eds., (1990) [hereinafter Hudec, *Judicialization of GATT*].

¹²⁰ *See id.* at 11.

¹²¹ *See generally* Holbein & Carpentier, *supra* note 9, at 536 (describing the GATT dispute resolution procedures); GATT Ministerial Declaration, *supra* note 114, at 25; Young, *supra* note 114, at 405.

¹²² *See* Understanding, *supra* note 1, art. 2(1) (giving the Dispute Settlement Body authority to establish panels and adopt their reports).

¹²³ *Id.*

a consensus not to do so.¹²⁴ An appellate body has been created for the appeal of panel reports, which is an entirely new apparatus in the WTO dispute resolution mechanism.¹²⁵ Prior to the WTO dispute resolution mechanism, if a Party disagreed with a panel report, its only option was to block adoption of the report. Since panel reports can no longer be blocked, an appeal process became necessary. If reports are not implemented in a reasonable period of time, the Dispute Settlement Body can call for compensation or authorize the suspension of concessions.¹²⁶ Binding arbitration procedures are provided for if a dispute arises over the definition of a reasonable period of time for implementation, or what appropriate compensation or concession suspension should be.¹²⁷

There is no question that the changes of the Uruguay Round are a major change in the world of international dispute resolution. The GATT (1947) dispute resolution mechanism has been thoroughly overhauled and transformed into a much more judicial and reliable process.¹²⁸

The anti-dumping system has been criticized as being protectionist and trade distorting. Economists believe that the focus of the system is on the protection of industry instead of acting in the best interests of consumers. It is unlikely that the current regime will be supplanted any time in the near future. The laws serve as a mechanism by which domestic industries can complain and vent their frustrations.

B. Substance

As discussed, a fundamental characteristic of Chapter 19 is that it does not directly address the anti-dumping and countervailing duty laws. Instead, it is a mechanism which simply strives to ensure that the laws are applied correctly. This focus is the primary difference between NAFTA's Chapter 19 and the WTO dispute resolution mechanism.

The WTO Agreements set out certain substantive norms and obligations which must be adhered to by all Members.¹²⁹ Members are obli-

¹²⁴ *Id.* at n.1 (stating that the "DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision").

¹²⁵ *Id.* art. 17 (appellate review).

¹²⁶ *Id.* art. 22 (compensation and the suspension of concessions).

¹²⁷ *Id.* art. 21 (surveillance of implementation of recommendations and rulings).

¹²⁸ It should be noted that the Round did not address the basic issue of whether the anti-dumping regime should be replaced with a system of harmonized competition laws. See Gastle, *supra* note 7, at 745.

¹²⁹ See Understanding, *supra* note 1, art. 1 (applying the rules of the Understanding to all Members of the WTO).

gated to conform their anti-dumping and countervailing duty regimes to the WTO Agreements.¹³⁰ Disputes brought to the WTO concern a country's implementing legislation.¹³¹ The issue revolves around the allegation that a particular law of, or its application by, a Member does not conform to the obligations it has agreed to as a Member of the WTO.

Whereas Chapter 19 is an international judicial review of national administrative action, the WTO dispute resolution mechanism can be compared to a constitutional court. Disputes concern whether or not certain national actions and laws conform to the internationally agreed upon norms. Both dispute resolution mechanisms are international, but the WTO focuses on national substantive law and its conformance with international substantive law, while Chapter 19 analyzes national procedure to see if it conforms with national substantive law.

Anti-dumping and countervailing duty obligations are addressed by Articles VI and XVI of the GATT, the Agreement on the Implementation of Article VI, and the Agreement on Subsidies and Countervailing Measures. These provisions are ascribed to by all Members of the WTO. The same is true for the Understanding. This is the "constitution" to which national anti-dumping and countervailing duty regimes must comply. This does not mean that the laws of all countries are the same. The WTO obligations are not very detailed, and Members are given wide latitude in their interpretation and implementation.

C. Procedure

Unlike Chapter 19 which checks domestic procedures against domestic law, the WTO dispute resolution mechanism is a procedure which checks domestic laws against international substantive obligations. The Understanding seeks to resolve disputes within a rule of law approach. Although countries are free to negotiate with each other instead of going to the Dispute Settlement Body, the mechanism is there, and can be resorted to whenever an aggrieved party lodges a request for the establishment of a panel.

¹³⁰ See GATT (1947), *supra* note 2, art vi (discussing anti-dumping and countervailing duties).

¹³¹ See Understanding, *supra* note 1, art. 1 (coverage and application) (stating that the procedures of the Dispute Settlement Body are for disputes concerning Members and their rights and obligations under the agreement).

1. Panel Initiation

As a multilateral agreement between governments, the WTO does not provide for private party involvement. Although countries may have mechanisms by which domestic industries can initiate the procedures which lead to a country bringing a complaint to the WTO, there is typically a degree of political discretion involved. The Parties to a dispute are the respective governments. WTO hearings themselves are closed, so interested Parties are not permitted to witness the proceedings which affect them directly.¹³² This is one of the primary shortcomings of the WTO system compared to Chapter 19. Although the WTO is an agreement between governments, ultimately private interests are the ones that are at stake. Even when a dispute concerns subsidies provided by a government, the beneficiary of the subsidies are private. Private parties should be able to initiate and participate in the process. This would lead to a greater understanding and acceptance of the system. Certain checks could be placed on private party participation so governments could protect national interests. At a minimum, the system should become more open, allowing interested parties access to the proceedings.

The mechanism has maintained a preference for resolution of disputes through consultations.¹³³ Consultations must be requested before a request for a panel can be made.¹³⁴ Article 6 of the Understanding states that if a complaining Party requests the establishment of a panel, it shall be established at the next meeting of the Dispute Settlement Body.¹³⁵ This is automatic, unless the Dispute Settlement Body decides by consensus not to establish the panel.¹³⁶ Since the Dispute Settlement Body is made up of all Members of the WTO, and, therefore, will include the Party that requested the panel, this step is essentially automatic.

Another GATT (1947) stumbling block was the adoption of the terms of reference for panels. In the WTO dispute resolution mechanism, unless the Parties to the dispute agree on terms within twenty days from the day the panel is established, the default terms of reference contained in Article 7 will be adopted.¹³⁷

¹³² WTO dispute resolution is for the use of the Members of the WTO. Members are the signatory countries. There is no mechanism for private parties to engage in the dispute settlement process.

¹³³ See Understanding, *supra* note 1, art. 4 (describing the consultation process).

¹³⁴ *Id.* art. 4(3).

¹³⁵ *Id.* art. 6(1).

¹³⁶ *Id.*

¹³⁷ *Id.* art. 7 (listing the terms of reference of panels).

2. Time

The GATT (1947) process was prone to significant delays and had no firm deadlines for the completion of dispute settlements. Article 20 of the Understanding stipulates that the Dispute Settlement Body shall consider the panel or Appellate Body report for adoption within nine months of the establishment of a panel, and within twelve months if there is an appeal.¹³⁸ There are some mechanisms for the extension of this time frame when the Appellate Body or panel agrees to it,¹³⁹ but the mechanism inexorably leads to a conclusion within a relatively short period of time. The ability of any one Party to extend the time beyond the nine or twelve-month period is extremely limited. This time period is in addition to the two-month consultation period that precedes the request for a panel.¹⁴⁰

The WTO dispute resolution mechanism process can take up to two or three months longer than the Chapter 19 mechanism. The extension of the Extraordinary Challenge Committee time frame from thirty to ninety days makes that process now equal to the time allowed for a WTO appeal. Whereas it is likely that the WTO Appellate Body will be frequently resorted to as losers generally avail themselves of their right to appeal, in contrast, the Extraordinary Challenge Committee was used only three times under the Free Trade Agreement, and not at all thus far under NAFTA. The NAFTA remand procedure is the Chapter 19 fault with respect to time. The remand process can add several months to the time it takes to complete Chapter 19 disputes, thus negating much of the apparent time advantage Chapter 19 has over the WTO dispute resolution mechanism.

3. Panel Composition

a. Panels

Article 8 of the Understanding sets out the procedures for the composition of WTO panels.¹⁴¹ Panels are composed of three members chosen from various rosters.¹⁴² Members may suggest individuals for

¹³⁸ *Id.* art. 20.

¹³⁹ *Id.*

¹⁴⁰ *Id.* (stating that the applicable nine or twelve-month period begins at the time the Dispute Settlement Body establishes a panel).

¹⁴¹ *Id.* art. 8 (describing panel composition).

¹⁴² *Id.* art. 8(5).

inclusion on the lists.¹⁴³ Panelists can be governmental or non-governmental individuals, but they are to serve in their capacity as independent persons.¹⁴⁴ Citizens of the countries which are party to the dispute are precluded from serving, unless the Parties agree otherwise.¹⁴⁵ The Secretariat proposes panelists,¹⁴⁶ and if the Parties cannot agree, the Director-General can appoint the appropriate panelists.¹⁴⁷

One of the inherent benefits of the WTO dispute resolution mechanism is its isolation from charges of nationalism. Since it will be extremely rare for citizens of disputants to sit on panels, and even then only with the agreement of both Parties, charges of national bias should be rare.

However, the process is not entirely free from charges of bias. Simply because a panelist is from a neutral country does not mean that a bias may not exist. For example, because of the prominence of the United States, the European Union, and Japan in international trade and disputes, panelists may have prejudicial feelings with respect to them. This sort of bias is difficult to avoid altogether except by choosing panelists known for their objectivity and lack of bias. As of yet, there have been no significant issues of bias with GATT (1947) or WTO disputes other than systemic complaints about the disposition of the institution as a whole. In addition, there are other potential biases created by the friction between developed and developing countries. Article 8(10) states that if a developing country is a Party to a dispute, it can request that at least one of the panel members be from a developing country.¹⁴⁸

b. Appellate Body

The establishment of a standing appellate body is perhaps the most definitive move of the Uruguay Round in the direction of legalism.¹⁴⁹ It is a tremendous step considering that under the GATT (1947) dispute resolution mechanism the only option a Party had if it disagreed with a

¹⁴³ *Id.* art. 8(4).

¹⁴⁴ *Id.* art. 8(1).

¹⁴⁵ *Id.* art. 8(3).

¹⁴⁶ *Id.* art. 8(6).

¹⁴⁷ *Id.* art. 8(7).

¹⁴⁸ *Id.* art. 8(10); *see also id.* art. 22(8) (stating that "if the case is one brought by a developing country Member, in considering what appropriate action might be taken, the Dispute Settlement Body shall take into account not only trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned").

¹⁴⁹ *See* Young, *supra* note 114, at 403.

panel report was to withhold consent for adoption. This was obviously not a satisfactory way to settle disputes, and it caused problems for all Parties concerned.

Article 17 of the Understanding establishes the Appellate Body as part of the WTO dispute resolution mechanism and contains provisions with respect to panelists.¹⁵⁰ The Body is composed of seven individuals, three of whom will serve on any one case.¹⁵¹ Who serves on what case is determined by rotation.¹⁵² Panelists should be of "recognized authority, with demonstrated expertise in law, international trade," and the subject matter of the WTO Agreements.¹⁵³ The Body should be broadly representative of the WTO membership as a whole.¹⁵⁴ Panelists serve four-year terms.¹⁵⁵

The permanent nature of the Body, particularly the continuity of panelists, could have a profound influence. This is the first time that panelists deciding WTO issues will sit on multiple cases over a long period time. Under GATT (1947) all panelists were appointed on an ad hoc basis. The WTO innovation could result in a degree of consistency of results and the development of a WTO jurisprudence.

4. Standard of Review

a. Panels

The standard of review is significant in international dispute resolution mechanisms as it determines the point at which international panels will respect national government determinations.¹⁵⁶ There is an inherent tension in dispute resolution mechanisms between the freedom and sovereignty of governments and the gains of international cooperation.¹⁵⁷ There is a danger in international trade that governments will act as the protagonists in the "prisoner's dilemma." That is, although all parties can benefit the most by acting in the best interests of the group, the uncertainty of these benefits makes the desired conduct unlikely. Parties are more apt to act in their own self-interest, as this appears to yield tangible and certain results.

¹⁵⁰ See Understanding, *supra* note 1, art. 17 (describing the standing appellate body).

¹⁵¹ *Id.* art. 17(6).

¹⁵² *Id.* art. 17(1).

¹⁵³ *Id.* art. 17(3).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* art. 17(2).

¹⁵⁶ See Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 194 (1996).

¹⁵⁷ See *id.* at 211.

An effective dispute resolution mechanism serves to coerce Parties into acting for the greater good by limiting the interpretations that Parties can put on their agreements.¹⁵⁸ Left on their own, Parties may act selfishly, and use broad interpretations of the WTO Agreements to circumvent and erect trade barriers in order to gain an advantage over other Parties. This risk of multiple interpretations may ultimately threaten the system of reciprocity upon which the WTO is based.¹⁵⁹

The Uruguay Round negotiations were affected by the feeling of many Parties that GATT (1947) panels had been too intrusive in overturning national agency determinations.¹⁶⁰ For this reason, the negotiators sought to limit the extent of panel scrutiny.

The standard of review for WTO panels is set out in Article 17.6 of the Agreement on the Implementation of Article VI:

- (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, *even though the panel might have reached a different conclusion*, the evaluation shall not be overturned;
- (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement *admits of more than one permissible interpretation*, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.¹⁶¹

The standard in Article 17.6 will only apply to anti-dumping actions.¹⁶² After three years, the Parties will turn to the issue of whether the standard is generally applicable to the rest of the Agreement.

This standard is new, and time will tell whether its application will diverge from previous GATT practice. On its face, the standard appears to require significant deference to administrative agencies by making the role of panels one of judicial review. The first part of the standard deals with factual determinations. It establishes a very deferential standard. This makes sense in light of the fact that panels "lack many fact gathering

¹⁵⁸ See *id.* at 209.

¹⁵⁹ See *id.* at 210.

¹⁶⁰ See *id.* at 195.

¹⁶¹ Decisions and Declarations Relating to the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, 33 I.L.M. 1125 (1994) (emphasis added) [hereinafter Implementation of Article VI].

¹⁶² See Croley & Jackson, *supra* note 156, at 198.

resources, [and] are ill positioned to second-guess a party's factual determinations."¹⁶³

Article 17.6(ii) concerns how Parties interpret their obligations under the Agreement and establishes a two-step process.¹⁶⁴ The first step is the determination of whether a provision "admits of more than one permissible interpretation, . . ."¹⁶⁵ Therefore, if a panel finds a provision to be only permissibly interpreted in one way, the national measure must conform to that interpretation. Only when there is a degree of ambiguity with respect to the interpretation will the second part of the process be engaged.¹⁶⁶ The question thus becomes, what sort of ambiguity will be necessary to compel proceeding to the second part of the test? Since the decision about whether a provision admits of more than one permissible interpretation is in the hands of the panel, the result of this standard may be an unintended shift of power to the panels.¹⁶⁷ At least one critic points out that panels will have to balance the interests which are involved.¹⁶⁸ Since the entire system ultimately rests on voluntary compliance, panels should be cautious about being activist. However, they must also protect the system from abuse, and so should not allow any undermining of the WTO rules.¹⁶⁹

Depending on the actions of panels, the standard may pose a barrier to the development of a WTO jurisprudence. Members have had wide latitude in the implementation of their WTO obligations. This standard was intended to allow that practice to persist. Therefore, two countries could have very different provisions aiming to satisfy the same WTO obligation, and panels will not have to choose what the correct interpretation is as long as both are permissible. The panels have been entrusted with a precarious balancing act, and we must wait to see if they succeed.

b. Appellate Body

The Appellate Body is limited to examining issues of law and developed legal interpretations covered in the panel reports under review.¹⁷⁰ However, since the standard of review is itself an issue of law,

¹⁶³ *Id.* at 208.

¹⁶⁴ *See* Implementation of Article VI, *supra* note 161, art. 17.6.

¹⁶⁵ Croley & Jackson, *supra* note 156, at 198.

¹⁶⁶ *See id.* at 200.

¹⁶⁷ *See id.* at 205.

¹⁶⁸ *See generally id.* at 212.

¹⁶⁹ *See id.*

¹⁷⁰ *See* Understanding, *supra* note 1, art. 17(6) (stating that "[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretation developed

the Appellate Body may also get its chance to try to properly balance the interests.¹⁷¹

D. Enforcement

The enforcement provisions of the WTO dispute resolution mechanism have also taken a significant step towards judicialization as compared to the GATT (1947) approach. The requirement of consensus for adoption of panel reports and the GATT (1947) emphasis on negotiated settlements meant that panel reports, including those adopted, were often used simply as a platform for discussion, instead of being used as binding decisions which compelled compliance.¹⁷²

1. Surveillance of Implementation

If a panel or Appellate Body concludes that a measure is inconsistent with a covered Agreement, it is required to recommend that the Member bring the measure into conformity.¹⁷³ The withdrawal of inconsistent measures is the first objective of the WTO dispute resolution mechanism. Reports are automatically adopted within sixty days of their circulation to the Dispute Settlement Body.¹⁷⁴ Article 21 of the Understanding addresses the surveillance and implementation of panel reports.¹⁷⁵ Within thirty days of adoption, the Member is required to inform the Dispute Settlement Body of its implementation intentions.¹⁷⁶ A reasonable period of time is allowed for implementation.¹⁷⁷ What constitutes a reasonable period of time is subject to binding arbitration if there is a dispute.¹⁷⁸ If the winning party is not satisfied with the compliance measures of the loser it can withdraw concessions.¹⁷⁹ The issue of the level of concessions to be withdrawn can also be forced to binding arbitration.¹⁸⁰ This entire process represents a shift towards a more judicial panel process and

by the panel").

¹⁷¹ See Croley & Jackson, *supra* note 156, at 195.

¹⁷² See Young, *supra* note 114, at 402-03.

¹⁷³ See Understanding, *supra* note 1, art. 19(1).

¹⁷⁴ *Id.* art. 16(4).

¹⁷⁵ *Id.* at art. 21 (regarding surveillance of implementation of recommendations and rulings).

¹⁷⁶ *Id.* art. 21(3).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* art. 21(3)(c).

¹⁷⁹ *Id.* art. 22 (describing compensation and suspension of concessions).

¹⁸⁰ *Id.* art. 22(6).

a "shift in influence from the Contracting Parties to the panels and the Appellate Body."¹⁸¹

2. International Obligations

As international agreements create binding international obligations, WTO panel reports adopted pursuant to the Understanding represent binding obligations in international law. The first problem with enforcing these obligations is that international law lacks coercive enforcement power.¹⁸² However, a sense of comity and obligation often result in a country's obedience of international obligations.

The threat of lack of compliance stands in the background of WTO disputes. As this is a new system, and is far more binding than the GATT (1947) dispute resolution mechanism, it remains to be seen how willing countries are to comply with panel reports. If countries are dissatisfied with the way the WTO dispute resolution mechanism works, they may become less willing to acquiesce when they feel wronged.

All eyes initially turned on the United States as it lost the first WTO case. United States - Standards for Reformulated and Conventional Gasoline concerned U.S. gasoline regulations and their application to Venezuela.¹⁸³ The United States lost the case on appeal. It appears that the ruling will be implemented by the United States given the stake it has in the WTO as a whole, and its responsibility as a leader to set an example for others.

In passing the WTO implementing legislation, a compromise was struck with Senator Dole to get his support for the bill. According to the compromise, the WTO Dispute Settlement Review Commission is to be established.¹⁸⁴ Sitting appellate judges would be appointed to review WTO dispute resolution mechanism decisions when the United States loses.¹⁸⁵ They will be there to ensure that the panel adhered to the proper standard of review and did not exceed its authority.¹⁸⁶ If three decisions are found to be erroneous, any member of Congress can bring a privileged resolution, calling for the renegotiation of WTO dispute resolution mechanism rules or the withdrawal of the United States from

¹⁸¹ Young, *supra* note 114, at 402-03.

¹⁸² See Hudec, *Judicialization of GATT*, *supra* note 119, at 20.

¹⁸³ United States - Standards for Reformulated and Conventional Gasoline Appellate Body, May 20, 1996, available in LEXIS, Intlaw Library, Gttwto File.

¹⁸⁴ See Gastle & Castle, *supra* note 16, at 893-94.

¹⁸⁵ See *id.*

¹⁸⁶ See *id.*

the WTO.¹⁸⁷ It has been argued that this could have a chilling effect on panels, but it is just as likely that it will lend credibility to the mechanism.

3. Retaliation

Although it is an option, retaliation has only been authorized once in the history of the GATT, and it was not used in that instance.¹⁸⁸ The problem with a withdrawal of concessions is that it often results in equivalent harm to the country withdrawing the concession. Consumers of the sanctioned imports are adversely affected, thus causing as much harm in the sanctioning country as in the target country.¹⁸⁹ Retaliation can also be a useless measure when the size of the countries is disparate. If the targeted country is much larger than the aggrieved country, the threat of retaliation may be insignificant.¹⁹⁰

Other than the fact that panel reports create binding international obligations and that aggrieved Parties can retaliate almost automatically, the WTO dispute resolution mechanism has no method to force compliance except by moral and political persuasion. It remains to be seen how countries will react to their obligations which emanate from the Dispute Settlement Body. WTO dispute resolution mechanism panels cannot create new obligations, but their decisions about what a country's obligations are will be a point of contention.

E. WTO Analysis and Conclusions

Since the WTO dispute resolution mechanism is new, it is difficult to evaluate how it has functioned, or to even make accurate predictions about how it will function. We only have the text of the Understanding and a few cases to evaluate, and must wait longer before actual practice can be accurately evaluated. Until then, all is supposition.

What seems plain is that the process will be more unified and adjudicatory.¹⁹¹ The procedures are clear and automatic. Parties will no longer be able to stonewall the process. Whether panel reports will be properly implemented remains to be seen, but there will be adopted panel reports and clear statements about the action which is required to conform with WTO obligations.

¹⁸⁷ See *id.*

¹⁸⁸ See Bello & Holmer, *supra* note 115, at 1103.

¹⁸⁹ See *id.*

¹⁹⁰ See Young, *supra* note 114, at 408.

¹⁹¹ See *id.* at 405.

The WTO dispute resolution mechanism provides a forum in which a country's laws can be challenged. Although the substance of the law cannot be changed by the WTO, panels can determine if a country has properly interpreted and implemented its laws according to WTO norms. Any further change to the existing trade law regime must come from multilateral and bilateral negotiations.

One of the chief Canadian concerns before the Uruguay Round was U.S. unilateral action and its ability to force its will on other countries by virtue of its power and position in the trade realm. The United States achieved many of its goals in the Uruguay Round. For example, the WTO now covers intellectual property and there are requirements for adequate enforcement.¹⁹² This, coupled with the WTO dispute resolution mechanism should lead to a diminution of U.S. unilateral action. The WTO dispute resolution mechanism's automatic process of authorizing retaliation will lead to a "more informed cost-benefit analysis of protectionist actions generally."¹⁹³

IV. FINAL ANALYSIS, COMPARISONS & CONCLUSIONS

As stated at the outset, the issue is not the choice of one of these two mechanisms over the other. What needs to be considered is how best to operate in a reality where both exist and to use them both effectively. After the advent of the Free Trade Agreement and before the Uruguay Round, there were very few anti-dumping and countervailing duty disputes brought to the GATT (1947). Chapter 19 provided a dispute resolution mechanism which could act as a check on the politicized national agency processes. The bilateral mechanism has been widely used, and from the standpoint of Canada, has generally been successful at lowering non-tariff barriers. There is no reason why this approach should be abandoned.

However, the shortcoming of Chapter 19 is its failure to address the underlying problem of the trade laws themselves. The WTO dispute resolution mechanism can more directly address this issue. With the procedural certainty of the new mechanism, it should be tested as a forum for addressing complaints about U.S. implementation of WTO obligations. The more comprehensive due process guarantees of the WTO make it unadvisable for Canada to "rely exclusively on the remedies provided by Chapter 19."¹⁹⁴

¹⁹² See Understanding, *supra* note 1, art. 22(3)(f)(iii) (applying concessions to intellectual property).

¹⁹³ Bello & Holmer, *supra* note 115, at 1103.

¹⁹⁴ Gastle & Castel, *supra* note 16, at 895.

The WTO dispute resolution mechanism also has an advantage over Chapter 19 because its resolutions are more permanent. Chapter 19 actions are isolated, and do not preclude future protective trade actions concerning the same products from being launched again. The WTO dispute resolution mechanism addresses this concern by requiring that underlying legal measures be changed.

The WTO, by virtue of its multilateral nature, is an institutional behemoth. In contrast, the implementation of NAFTA is primarily left to the parties themselves. This creates a totally different dynamic for disputes that is contingent on the forum. NAFTA disputes will generally revolve around discussions between senior officials. Even the Chapter 19 process can be affected by this dynamic as was seen in the Softwood Lumber dispute. At the WTO, although consultations are encouraged, the dispute resolution mechanism is more adjudicatory and puts the parties in the position of opposing litigants.

A Hobson's choice is one where there is no real alternative given. These dispute resolution mechanisms have fundamental differences which preclude the issue from being one of a simple choice. Canada and Canadian industries should choose to use both avenues. Chapter 19 has proven to be a beneficial option for Canada, and the WTO dispute resolution mechanism's new reliance on the international rule of law makes that mechanism more attractive as a way to challenge the laws of the United States.

